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OMB-01 NSC-07 SS-20 STR-08 L-03 H-03 PA-04 PRS-01

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E.O.11652: N/A

TAGS: EFIN, ETRN, OECD

SUBJECT: UN LINER CONFERENCE CODE AND OECD INVISIBLES
CODE

REFS: (A) STATE 116600

(B) USOECD 11848

(C) USOECD 12192

(D) OECD DOCUMENT DAF/INV/74.33

(E) OECD DOCUMENT DAF/INV/74.7

1. SUMMARY: INVISIBLES COMMITTEE (IC) HELD SPECIAL MEETING JUNE 5 TO CONSIDER POSSIBLE LEGAL CONFLICTS BETWEEN UN LINER CONFERENCE CODE OF CONDUCT AND OECD CURRENT INVISIBLES CODE (CIC). IC FAILED TO COME TO GRIPS WITH SUBSTANTIVE QUESTIONS OF COMPATIBILITY, AS COUNTRIES IN FAVOR OF UN CODE (INCLUDING FRENCH CHAIRMAN) SUCCEEDED IN SETTING UP PROCEDURAL AND JURISDICTIONAL DIVISIONS. INTERIM REPORT TO COUNCIL WILL NOT PREJUDGE FINAL IC CONCLUSIONS OR COMPATIBILITY QUESTION, AND WILL SIMPLY IDENTIFY POSSIBLE PROBLEM AREAS BETWEEN UN AND OECD CODES. GOVERNMENTS WILL BE ASKED TO BEAR THESE PROBLEMS IN MIND WHEN CONSIDERING ADHERENCE TO UN CODE, BUT WILL NOT BE SPECIFICALLY REQUESTED BY COUNCIL TO DELAY SIGNING UNTIL IC DELIBERATIONS CONCLUDED. END SUMMARY.

2. IC SPLIT ALONG STRICTLY POLITICAL LINES AS INDEPENDENT EXPERTS AND CHAIRMAN MANEUVERED FOR RESULTS FAVORABLE TO NATIONAL VIEWPOINTS. TWO GROUPS QUICKLY EMERGED: (1) COUNTRIES WHICH HAD VOTED AGAINST UN CODE OR ABSTAINED IN GENEVA (NO-VOTE COUNTRIES) WERE IN FAVOR OF INCOMPATIBILITY FINDING, AND WANTED STRONG INTERIM REPORT TO COUNCIL CONTAINING RECOMMENDATION THAT COUNTRIES NOT SIGN UN CONVENTION UNTIL IC STUDY COMPLETED (US, UK, SWITZERLAND, GREECE, NORWAY); (2) COUNTRIES WHICH HAD VOTED IN FAVOR OF UN CODE (YES-VOTE COUNTRIES) WERE AGAINST INCOMPATIBILITY FINDING, AND CONCENTRATED EFFORTS ON OBTAINING WEAK INTERIM REPORT TO COUNCIL WITHOUT RECOMMENDATION TO DELAY SIGNING UN CONVENTION (SPAIN, JAPAN, FRANCE, BELGIUM, SUPPORTED BY FRENCH CHAIRMAN). GERMANY, WHICH VOTED FOR UN CODE, EXPRESSED NO VIEWS ON COMPATIBILITY BUT SUPPORTED STRONG REPORT AND NON-SIGNING RECOMMENDATION. OTHER COUNTRIES WERE SILENT (DENMARK AND OTHERS) OR ABSENT FROM DISCUSSION (SWEDEN, FINLAND).

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COMMENDATION TO DELAY SIGNING UN CONVENTION (SPAIN, JAPAN, FRANCE, BELGIUM, SUPPORTED BY FRENCH CHAIRMAN). GERMANY, WHICH VOTED FOR UN CODE, EXPRESSED NO VIEWS ON COMPATIBILITY BUT SUPPORTED STRONG REPORT AND NON-SIGNING RECOMMENDATION. OTHER COUNTRIES WERE SILENT (DENMARK AND OTHERS) OR ABSENT FROM DISCUSSION (SWEDEN, FINLAND).

3. PRIOR TO MEETING, U.S. ALTERNATE CONSULTED WITH UK,

SWISS, NORWAY AND DENMARK (GREECE NOT YET PRESENT) TO DEVELOP STRATEGY FOR MEETING AS INSTRUCTED REF A. SINCE INTENT OF PRELIMINARY IC MEETING WAS NOT TO REACH CONCLUSIONS REGARDING COMPATIBILITY, REPS AGREED TO SEEK STRONG INTERIM REPORT IDENTIFYING ISSUES AND RECOMMENDING NON-SIGNATURE OF UN CONVENTION WHILE IC STUDY IN PROGRESS. HOWEVER, FRENCH CHAIRMAN IN OPENING REMARKS MADE CLEAR HIS SUPPORT FOR COUNTRIES SEEKING WEAK REPORT TO COUNCIL WITHOUT RECOMMENDATION ON SIGNING. TACTICS OF YES-VOTE COUNTRIES, LED BY HIGHLY VOCAL SPANISH EXPERT (PUIG) AND FREQUENTLY SUPPORTED BY CHAIRMAN, WERE TO QUESTION IC JURISDICTION VIS-A-VIS MARITIME TRANSPORT COMMITTEE, TO RESURRECT STILL UNRESOLVED ISSUE OF CIC NOTE 1 APPLICABILITY TO EXISTING LINER CONFERENCES, AND TO PRESS FOR BLAND INTERIM REPORT ON GROUNDS THAT TOO MUCH PRECISION IN DESCRIBING PROBLEMS MIGHT PREJUDGE COMPATIBILITY QUESTION. THESE TACTICS LARGELY SUCCESSFUL IN OFFSETTING SWISS, UK AND NORWEGIAN INTERVENTIONS, AND IN AFTERNOON SESSION U.S. ALTERNATE JOINED ACTIVELY WITH

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GREEK AMBASSADOR TO SEEK STRENGTHENED REPORT.

4. JURISDICTION OF IC: MAIN THRUST OF JURISDICTIONAL QUESTION WAS WHETHER IC OR MTC WAS BEST SUITED TO DEAL WITH INTERLINKED LEGAL AND SUBSTANTIVE QUESTIONS ON OPERATIONS OF LINER CONFERENCES, AND WHETHER IC COULD PROCEED ON LEGAL ASPECTS BEFORE MTC HAD EXAMINED SUBSTANTIVE ASPECTS. IC CONCLUDED THAT IT WOULD HAVE TO WORK IN CONSULTATION WITH MTC, ESPECIALLY ON NOTE 1 APPLICABILITY PROBLEM (SEE BELOW), SINCE IT WAS NOT SUFFICIENTLY INFORMED ON MATTERS INVOLVING ORGANIZATION AND OPERATIONS OF LINER CONFERENCES. ON LEGAL ASPECTS OF CIC, RESPONSIBILITY CLEARLY LAY WITH IC TO REACH CONCLUSIONS AND REPORT TO COUNCIL.

5. APPLICABILITY OF NOTE 1: SPANISH REP RAISED QUESTION OF INTERPRETATION OF NOTE 1 AS IT APPLIES TO EXISTING LINER CONFERENCES. IN PAST, IC HAS CONSIDERED LINER CONFERENCES TO BE OUTSIDE JURISDICTION OF CIC ON GROUNDS THAT THEY ARE PRIVATE ORGANIZATIONS NOT SUBJECT TO GOVERNMENT INFLUENCE OR PARTICIPATION. THUS, IC HAS NOT FELT IT NECESSARY TO APPLY LIBERALIZATION OBLIGATIONS OF CIC TO RESTRICTIVE PRACTICES OF SUCH CONFERENCES. IN

LATE 1973, FRENCH CHALLENGED THIS INTERPRETATION IN MTC AND REQUESTED OECD LEGAL OPINION. FRENCH TOOK POSITION THAT SHIPPING COMPANIES ARE OFTEN SUBJECT TO GOVERNMENT REGULATION, AND MONOPOLY PRACTICES OF THESE SHIPPING COMPANIES IN CONFERENCE CONTEXT WERE CONTRARY TO PRINCIPLE OF FREE COMPETITION. NEVERTHELESS, OECD LEGAL DIVISION CONCLUDED THAT LINER CONFERENCES WERE INDEED PRIVATE AND CONSEQUENTLY NOTE 1 OF CIC WAS INAPPLICABLE (REF E). OECD LEGAL NOTE WENT TO IC FOR DISCUSSION IN JANUARY 1974, BUT WAS POSTPONED PENDING FURTHER CHANGES IN DOCUMENT. THUS, QUESTION OF LEGAL INTERPRETATION OF CIC APPLICABILITY TO EXISTING LINER CONFERENCES HAS NOT BEEN SATISFACTORILY RESOLVED BY IC.

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6. YES-VOTE COUNTRIES EXPRESSED VIEW THAT IC MUST RULE ON APPLICABILITY OF CIC TO EXISTING CONFERENCES BEFORE IT CAN SATISFACTORILY DEAL WITH UN CODE. THIS WOULD INVOLVE DETERMINING WHETHER LINER CONFERENCES ARE PRIVATE ORGANISMS OR ARE SUBJECT TO GOVERNMENT INFLUENCE. IF GOVERNMENTS INVOLVED, THEN RESTRICTIVE PRACTICES AGREED BY CONFERENCES WOULD BE SUBJECT TO CIC LIBERALIZATION PROVISIONS. ALTERNATIVELY, IF IC FINDS CONFERENCES TO BE PRIVATE, NEXT QUESTION WOULD BE TO DETERMINE EXTENT OF OFFICIAL INFLUENCE OVER LINER CONFERENCES UNDER UN CODE AND WHETHER UN CODE WOULD CHANGE THEIR PRIVATE CHARACTER. THIS TWO-PRONGED ARGUMENT SOUGHT TO CREATE LINK WHERE NO LINK SHOULD HAVE EXISTED, AND THREW UP EFFECTIVE SMOKE SCREEN OVER DISCUSSION OF MAIN ISSUES.

7. U.S. REP POINTED OUT THAT REGARDLESS OF PRIVATE OR GOVERNMENTAL NATURE OF EXISTING CONFERENCES, IC'S PRIMARY RESPONSIBILITY WAS TO DETERMINE WHETHER UN CODE PROVISIONS ON ADMISSION TO CONFERENCES AND CARGO SHARING WERE COMPATIBLE WITH NON-DISCRIMINATION PROVISIONS OF CIC ARTICLE 9 AND LIBERALIZATION REQUIREMENTS OF ANNEX A, NOTE 1. CENTRAL QUESTION WAS WHETHER UN CODE WOULD CREATE SITUATION IN WHICH LINER CONFERENCES - PRIVATE OR OTHERWISE - WERE HENCEFORTH SUBJECT TO LEGALLY IMPOSED REQUIREMENTS OBLIGING THEM TO ACT IN DISCRIMINATORY FASHION. GREEK REP AGREED THAT PRIVATE OR GOVERNMENTAL NATURE OF EXISTING CONFERENCES WAS INTERESTING BUT IMMATERIAL TO QUESTION OF UN CODE. PRINCIPAL QUESTION WAS WHETHER UN CODE, ESPECIALLY 40:40:20 CARGO-SHARING PROVISION, WAS MANDATORY IN ITS APPLICATION. IF GOVERNMENT ROLE COULD BE DEMONSTRATED BEYOND DOUBT, HE (AND GERMAN REP) BELIEVED THERE MIGHT BE CONFLICT WITH CIC.

8. IN BRIEF DISCUSSION OF SUBSTANTIVE ASPECTS OF UN
CODE, BELGIAN AND JAPANESE REPS PLACED PARTICULAR
EMPHASIS ON PHRASE "UNLESS OTHERWISE AGREED," WHICH PRE-
CEDES CARGO-SHARING PROVISION. NO-VOTE COUNTRIES RES-
PONDED THAT CONVENTION WOULD NOT INCLUDE SUCH REQUIRE-
MENT IF IT WAS NOT INTENDED TO BE APPLIED. SIMILARLY,
IN RESPONSE TO YES-VOTE COUNTRIES' SUGGESTION THAT
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CARGO-SHARING REQUIREMENT WOULD NOT BE MANDATORY BECAUSE
SHIPPERS COULD ALWAYS CHOOSE BETWEEN CONFERENCE AND NON-
CONFERENCE SHIPPING LINES, NO-VOTE COUNTRIES REFERRED TO
REMARKS BY INDIA (REF D, PARA 21) ON POSSIBLE
LEGISLATIVE CONTROL OF NON-CONFERENCE LINES. JAPANESE
ALSO NOTED THAT GOVERNMENT INTERVENTION WAS NOT ASSURED,

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SINCE UN CODE ONLY PROVIDED FOR AUTHORITIES TO ACT AS OBSERVERS IN CONFERENCE AFFAIRS. NO-VOTE COUNTRIES POINTED OUT PROVISIONS IN UN CODE FOR CONTRACTING PARTIES TO "TAKE ANY LEGISLATIVE OR OTHER MEASURES AS MAY BE NECESSARY TO IMPLEMENT CONVENTION," AND CONCLUDED THAT GOVERNMENT INTERVENTION WOULD BE MANDATORY. CHAIRMAN SUMMARIZED BRIEF DEBATE AS DEMONSTRATING DIFFERENCES OF VIEWS, LACK OF CONCLUSIONS, AND NEED TO DRAFT INTERIM REPORT IN NON-PREJUDICIAL TERMS.

9. INTERIM REPORT TO COUNCIL: SECRETARIAT (SCHLEPEGRELL) PROPOSED THAT REPORT SIMPLY POSE THREE QUESTIONS WHICH IC WOULD STUDY FURTHER:

1. POSITION OF PRESENT LINER CONFERENCES UNDER CIC AND WHETHER RECONCILABLE WITH NOTE 1.
2. ROLE OF GOVERNMENTS REGARDING ADMISSION TO LINER CONFERENCES UNDER UN CODE.
3. EXTENT TO WHICH 40:40:20 CARGO-SHARING PROVISION IS MANDATORY. GOVERNMENTS WOULD BE ADVISED TO BEAR IN MIND THESE QUESTIONS WHEN CONSIDERING ADHERENCE TO UN CODE.

10. U.S. ALTERNATE SOUGHT ACTIVELY TO BROADEN SCOPE OF

REPORT SO THAT ISSUES WOULD BE CLEARLY DEFINED, AND
RELEVANT PROVISIONS OF CIC AND UN CODE INCLUDED. BRIT-
ISH AND GREEKS SUPPORTED INITIATIVE, AND CHAIRMAN AGREED
TO EXPAND "APPROPRIATELY." SEVERAL COUNTRIES SUPPORTED
GERMAN REQUEST FOR SPECIFIC RECOMMENDATION TO COUNCIL
ASKING COUNTRIES TO AWAIT FINAL IC DECISION BEFORE SIGN-
ING UN CODE, BUT CHAIRMAN REJECTED.

11. SECRETARIAT FORESEES FURTHER DISCUSSION THIS ISSUE
AT SEPTEMBER MEETING, FOLLOWED BY CONSULTATIONS WITH MTC
IN OCTOBER, AND FINAL REPORT HOPEFULLY APPEARING TOWARD
END OF YEAR. MISSION VIEW ON BASIS IC JUNE 5 DEBATE IS
THAT TIMETABLE COULD WELL BE EXTENDED CONSIDERABLY IF
YES-VOTE COUNTRIES DESIRE AVOID INCOMPATIBILITY RULING.
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